

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE JOINT APPLICATION OF ORCHARD GRASS
UTILITIES, INC. AND OLDHAM COUNTY SEWER
DISTRICT FOR APPROVAL OF THE TRANSFER OF
WASTE WATER TREATMENT FACILITIES PURSUANT
TO STOCK PURCHASE AGREEMENT BETWEEN THE
PARTIES

CASE No. 2004-00029

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PUBLIC SERVICE
COMMISSION

**POST HEARING BRIEF
OF THE OLDHAM COUNTY SEWER DISTRICT**

Comes now the Oldham County Sewer District, by counsel, and files this brief in accordance with the invitation extended by the Hearing Officer, Hon. Howell Brady, Jr., extended at the hearing held in this matter on April 15, 2004. Oldham County Sewer District ("OCSD") is a joint applicant herein and seeks authorization from the Kentucky Public Service Commission ("PSC") for the transfer of the wastewater treatment assets and business of Orchard Grass Utilities, Inc. ("Orchard Grass") in accordance with the Stock Purchase Agreement ("Agreement") which is attached as Exhibit A to the Joint Application.

ARGUMENT

I. The record clearly reflects that OCSD has the "financial, technical and managerial abilities" to authorize the transfer under KRS 270.020(4).

Orchard Grass is a privately owned, publicly regulated utility providing sewer service to customers at its Orchard Grass Wastewater Treatment Plant ("WWTP") and Willow Creek

WWTP. As a regulated utility, PSC authorization is required to transfer ownership or control of Orchard Grass to another entity. KRS 278.020(4). Further, requirements of that provision are simple and direct:

The Commission shall grant its approval if the person acquiring the utility has the financial, technical and managerial abilities to provide reasonable service. (emphasis added)

The PSC has a legitimate interest in assuring that there would be no discontinuation of service to utility customers as a result of a contemplated transfer of ownership. The criteria to be used to determine the appropriateness of the transfer are defined by the General Assembly to be the assurance that the acquiring agency "has the financial, technical, and managerial abilities to provide reasonable service." The record only permits the PSC's conclusion that OCSD has the requisite statutory abilities which compel approval of the transfer.

Financial Abilities

OCSD has seen considerable growth since it was established in December 1996 by the Oldham County Fiscal Court. Its mission is to provide comprehensive sewer services to the people of Oldham County including the acquisition of privately owned packaged wastewater treatment plants such the Orchard Grass and Willow Creek WWTP's. (Testimony of John Bennett, Jr., Hearing, April 15, 2004) Either alone or in cooperation with the Louisville/Jefferson County Metropolitan Sewer District ("MSD"), OCSD currently owns and operates eleven sewage treatment plants in Oldham County, serving approximately 3,711 residential and commercial customers. As detailed in its latest audited financial statement (Exhibit F to the Joint Application), OCSD has grown from an original budget of \$25,000 to

current revenues to approximately \$1.4 million, including a cash balance as of March 31, 2004 of over \$892,000. (OCSD Supplemental Response to PSC Staff Data Request).

In addition, effective February 11, 2004, OCSD established a new uniform rate structure for all Oldham County residents, i.e., a fixed rate of \$7.67 per month plus \$3.20 per one thousand gallons of water used. By consolidating Oldham County sewer customers into a larger governmental utility, OCSD is able to achieve a fair and uniform rate structure with consistent operating revenues, while reducing operation costs through consolidations, eliminations, and other economies of scale.

Technical Ability

John M. Bennett, Jr., Chief Engineer of OCSD, will supervise the operation of the Orchard Grass and Willow Creek WWTP's. Mr. Bennett's resume is attached as Exhibit H to the Joint Application. A professional engineer, Mr. Bennett has over thirty years experience in the design and operation of wastewater treatment facilities. Prior to joining OCSD in 1999, Mr. Bennett assisted in the development of the Oldham County Action Plan and the Oldham County and Buckner Facilities Plans. Mr. Bennett supervises a staff which includes two licensed wastewater treatment plant operators in addition to maintenance and administrative staff.

OCSD also has entered into an Interlocal Cooperation Agreement with MSD to provide for service options near the Jefferson County line, for joint wastewater facilities planning to serve the interests of both northeast Jefferson County and parts of Oldham County, and to cooperate in the development of a regional plant to serve residents of these communities. (See OCSD Supplemental Response to PSC Staff Data Requests).

Managerial Ability

In addition to Mr. Bennett and the staff identified above, OCSD is governed by a Board of Directors in accordance with KRS 220.140. These three directors are appointed by the Oldham County/Judge Executive for terms of four years, and must reside within the district served. The current president is Forrest B. Ewen, a licensed professional architect, whose community involvement also includes service on the Oldham County Water Board.

Thomas E. Davis is a member of the Board of Directors and Treasurer of OCSD. Retired from Ford Motor Company, Mr. Davis has extensive financial management experience serving international companies with revenues of \$600 million annually. His experience includes the directing and managing of staff, profit and cost analysis, budgeting, accounting, business systems support, and business planning. (Mr. Davis' resume is attached as Item 2 to the Exhibits introduced at the Hearing of April 15, 2004).

John B. Maleug, P.E., is Secretary and a member of the OCSD Board. He is a professional engineer with over 20 years experience in water resource planning, design, construction and management. He holds degrees in both civil and environmental engineering, and water biology, and is a certified wastewater treatment plant operator. Like Mr. Bennett, Mr. Maleug's professional experience includes a broad array of water and wastewater projects, including the implementation and design of sanitary sewers, pump stations and other treatment facilities. (Mr. Maleug's resume is attached as Item 1 to the Exhibits introduced at the Hearing of April 15, 2004.)

The record clearly shows that OCSD has the financial, technical and managerial abilities to provide reasonable service to the customers of Orchard Grass. As such, the Commission "shall grant its approval" in accordance with its declaration of jurisdiction contained at KRS

278.020(4). Indeed, the PSC has found OCSD to meet the statutory requirements, having approved acquisition of facilities by OCSD in the following matters:

Case No. 99-496;

Case No. 2000-166;

Case No. 2001-187;

Case No. 2001-403;

Case No. 2002-423; and

Case No. 2003-262.

The Commission should approve the requested Joint Application for transfer of Orchard Grass to OCSD.

II. KRS 278.020(5) is not applicable to this transaction.

At the hearing of April 15, 2004, PSC staff and counsel expressed their opinion that KRS 278.020(5) was applicable to this transaction and the Commission's jurisdiction includes its ability to determine if this acquisition is "in accordance with law, for a proper purpose and is consistent with the public interest." While OCSD submits that each of those criteria are well established in the record, OCSD further believes that subsection 5 is inapplicable herein.

Specifically, 278.020(5) places limitations or restrictions on the ability of an entity to acquire a utility in the state. As indicated earlier, while OCSD acknowledges the jurisdiction of the PSC over Orchard Grass and its request to transfer ownership under KRS 278.020(4), OCSD submits that the PSC lacks jurisdiction over it as an independent governmental entity. *See, Oldham County Sanitation District v. Kentucky Public Service Commission*, (Case No. 2001-CA-001482-MR) Opinion, July 12, 2002; discretionary review denied by the Kentucky Supreme

Court, (Case No. 2002-SC-000839) September 10, 2003. Since the PSC lacks jurisdiction over OCSD, it cannot impose limitations upon its acquisition pursuant to subsection 5 of the statute.

The above objection notwithstanding, it is clear on the record that OCSD fully meets the criteria required by subsection 5. As indicated above, the mission of OCSD is to provide further regionalization of wastewater treatment in Oldham County, in part to permit the elimination of package treatment plants to improve stream quality throughout the county. KRS 220.260 gives OCSD authority to review and approve all sewer service within its jurisdictional area in cooperation with the Cabinet for Natural Resources. Since, pursuant to KRS 65.115 a privately owned treatment plant cannot be eliminated by a governmental agency without the payment of just compensation, it is clear that OCSD must acquire the assets of Orchard Grass in order to eliminate the two treatment plants, and to permit OCSD to utilize the Orchard Grass facilities as part of its comprehensive design and planning for county-wide sewer service. The rates to be charged the current customers of Orchard Grass will be identical to those rates charged to all other OCSD customers as required by KRS 220.135(7). The record clearly supports the application for transfer by establishing each of the criteria set forth in KRS 278.020(5).

III. The PSC lacks jurisdiction over OCSD's acquisition pursuant to KRS 220.540, KRS 278.040, and KRS 220.310.

Finally, for the record, OCSD submits that having determined that OCSD has the financial, technical and managerial abilities to acquire Orchard Grass, the PSC lacks jurisdiction to place additional conditions on OCSD for approval of the transfer application. First, KRS 220.310, along with KRS 65.115, grants to OCSD the powers of eminent domain under the laws of the Commonwealth of Kentucky. Since the General Assembly has deemed it within the

authority of OCSD to enter into contracts and to compel, if necessary, the acquisition of assets from third parties, the PSC lacks the authority to review the terms of those proceedings.

Second, KRS 220.540 provides:

No proceedings except as provided in KRS 220.010 to 220.530 shall be required for the acquisition of sanitary works or the issuance of bonds under those sections, notwithstanding any contrary provisions of the general laws of the state....

Since OCSD is not a utility governed by the Public Service Commission under KRS 278.010, and since the rights and powers of OCSD are specifically established by KRS Chapter 220, the PSC lacks the authority to impose additional requirements upon OCSD as a condition of its acquisition of the assets of Orchard Grass.

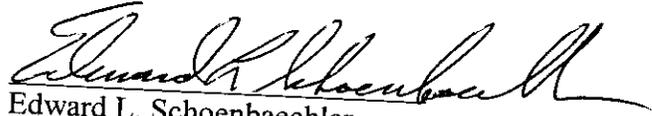
Finally, KRS 278.040(2) provides:

The jurisdiction of the Commission shall extend to all utilities in this state. The Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this Chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.

Since OCSD is not a utility within the jurisdiction of the Public Service Commission, and is a municipal corporation and political subdivision of the state, the PSC lacks the statutory authority to review and approve the contractual decisions made by the OCSD Board of Directors with regard to the acquisition of the assets of Orchard Grass. *See, City of Lexington v. Hager, Ky. 337 S.W.2d 27 (1960).*

WHEREFORE, the Oldham County Sewer District respectfully submits that the Joint Application for Approval of the Transfer of the Assets of Orchard Grass Utilities, Inc. to the Oldham County Sewer District be approved.

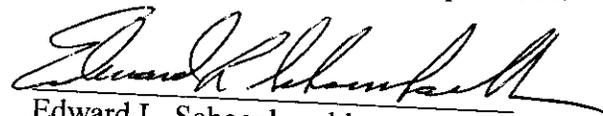
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by first class mail, postage prepaid, on: Robert C. Moore, Hazelrigg & Cox, LLP, P. O. Box 676, 415 West Main Street, Frankfort, Kentucky 40602; Robert L. Madison, 5407 Baywood Drive, Louisville, Kentucky 40241-1318; and David Edward Spenard, Assistant Attorney General, 1024 Capital Center Drive, Suite 200, Frankfort, Kentucky 40601-8204, on this the 26th day of April 2004.



Edward L. Schoenbaechler

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